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DATO' TAN CHIN WOH v. DATO' YALUMALLAI V MUTHUSAMY

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
ZULKEFLI AHMAD MAKINUDIN CJ (MALAYA)
B RICHARD MALANJUM CJ (SABAH & SARAWAK)
SURIYADI HALIM OMAR FCJ
ABU SAMAH NORDIN FCJ
[CIVIL APPEAL NO: 02(f)-43-08-2013]
28 JULY 2016

C

CIVIL PROCEDURE: *Appeal – Libel – Appeal to Court of Appeal – Defence of qualified privilege – Powers and jurisdiction of Court of Appeal – Whether could substitute defence as pleaded with that of absolute privilege which was never pleaded by defendant – Plaintiff not availed of opportunity to submit on substituted defence* D *– Whether Court of Appeal acted contrary to rules of natural justice – Whether occasioning miscarriage of justice – Courts of Judicature Act 1964, s. 69(4) – Rules of the Court of Appeal 1994, r. 18(2)*

CIVIL PROCEDURE: *Pleadings – Libel – Appeal to Court of Appeal – Defence of qualified privilege – Defence substituted by court with that of absolute privilege* E *which was never pleaded by defendant – Whether Court of Appeal had misdirected itself – Power of appellate court to consider points not expressly taken in memorandum of appeal – Whether subject to paramount rule that parties were bound by their pleadings – Courts of Judicature Act 1964, s. 69(4) – Rules of the Court of Appeal 1994, r. 18(2)*

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JURISDICTION: *Court of Appeal – Powers and jurisdiction – Whether could consider new points not expressly taken in memorandum of appeal – Whether exercise of power subject to overriding discretion to do justice – Whether subject to paramount rule that parties were bound by their pleadings – Courts of Judicature Act 1964, s. 69(4) – Rules of the Court of Appeal 1994, r. 18(2)*

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The plaintiff ('appellant') had sued the defendant ('respondent') for libel arising from a police report and a written complaint to the Bar Council which the latter had made against the former. Before the High Court, the learned judge took the view that the defence of qualified privilege as pleaded by the defendant failed, and in the circumstances allowed the plaintiff's claim and H awarded the plaintiff general, aggravated and exemplary damages totalling RM230,000. On appeal, however, the decision was overturned by the Court of Appeal on the grounds that both the police report and the letter of complaint were not actionable in law, that the defence of absolute privilege, though not specifically pleaded, applied to exculpate the defendant from I liability, and that s. 69(4) of the Courts of Judicature Act 1964 ('CJA') conferred on the Court of Appeal the power to allow an appeal on a particular ground, even if that ground was not canvassed before the High

Court. The plaintiff was granted leave to appeal by the Federal Court, and pursuant thereof posed four questions of law to the learned justices herein, including, essentially: (a) whether the Court of Appeal hearing an appeal against the decision of the High Court could invoke s. 69(4) of the CJA to substitute the pleaded defence of qualified privilege with that of absolute privilege notwithstanding the latter defence was not pleaded nor raised before the High Court ('question (iii)'); and (b) whether an appellate court, after confining parties on appeal to only one issue of defence for purpose of the appeal in law, could avail the appellant another issue of defence which the appellant had never pleaded nor raised in the court of first instance ('question (iv)'). The questions aside, the plaintiff also contended that the Court of Appeal, in substituting the defendant's pleaded defence, had not given him the right of hearing, thereby rendering the decision fatally flawed and unsustainable in law.

Held (allowing appeal and reinstating order of High Court)
Per Arifin Zakaria CJ delivering the judgment of the court:

(1) Considering the four questions posed, it was appropriate for this court to first deal with questions (iii) and (iv). Should the court's answer to these questions be in the negative, it would not then be necessary to answer questions (i) and (ii). (para 11)

(2) While it is true that the Court of Appeal can consider a point not expressly taken in the memorandum of appeal or argued in the court below based on the broad wording of s. 69 of the CJA and r. 18(2) of the Rules of the Court of Appeal 1994, this is subject to the overriding discretion of the court to do justice. Where the justice of the case requires a departure from the rule that parties should be bound by the grounds in the memorandum of appeal, the court may allow a new point to be argued. In so doing, it is not however the duty of the Court of Appeal to invent or create a cause of action, or a defence under the guise of doing justice for the parties, as it is also trite that parties in litigation are bound by the four corners of their pleadings. (para 14)

(3) From the authorities and the plain reading of s. 69(4) of the CJA, the power of the Court of Appeal is only to draw inferences of facts and to make an order which ought to have been made by the High Court. The power is essentially limited to making of inferences of facts from the facts as found by the High Court. It does not confer on the Court of Appeal the power to substitute pleadings of party in any circumstances. To do so would be contrary to the cardinal principle in civil litigation, that parties are bound by their pleadings. (para 15)

(4) The Court of Appeal had erred and/or misdirected itself in invoking the defence of absolute privilege which was never pleaded nor raised in the trial before the High Court. The answer to the question (iii) was therefore in the negative. (para 16)

(5) Whenever the court proposes to consider a fresh issue which the court considers pertinent to the case before it, it should give the parties the right to make submissions on the proposed issue before arriving at its finding. This is fundamental in the adversarial system practised in this country. Based on the transcript, which was not challenged by the defendant, the Court of Appeal had clearly failed to give the plaintiff the right to reply on the defence of absolute privilege. The Court of Appeal had thus acted contrary to the rules of natural justice which, in turn, had occasioned a miscarriage of justice. Question (iv) was therefore also answered in the negative. (paras 19, 21 & 22)

Bahasa Malaysia *Headnotes*

Plaintif ('perayu') telah mengambil tindakan libel terhadap defendan ('responden') ekoran satu laporan polis dan aduan bertulis kepada Majlis Peguam yang dibuat oleh pihak terkemudian terhadapnya. Di hadapan Mahkamah Tinggi, Yang Arif Hakim mengambil pandangan bahawa pembelaan keistimewaan terhad seperti yang diplidkan oleh defendan gagal, dan berikutnya membenarkan tuntutan dan mengawardkan plaintif ganti rugi am, ganti rugi teruk dan ganti rugi teladan berjumlah RM230,000. Di rayuan, keputusan bagaimanapun diakas oleh Mahkamah Rayuan atas alasan bahawa kedua-dua laporan polis dan surat aduan tidak boleh menjadi asas untuk tindakan undang-undang, bahawa pembelaan keistimewaan terhad, walaupun tidak diplid secara khusus, terpakai untuk melepaskan defendan daripada sebarang liabiliti, dan bahawa s. 69(4) Akta Mahkamah Kehakiman 1964 ('AMK') memberi kuasa kepada Mahkamah Rayuan untuk membenarkan rayuan atas suatu alasan tertentu, walaupun alasan tersebut tidak dibangkitkan di hadapan Mahkamah Tinggi. Plaintif diberi kebenaran untuk merayu oleh Mahkamah Persekutuan, dan ekoran itu mengemukakan empat soalan undang-undang kepada Yang Arif Hakim-hakim di sini, termasuk, secara intinya: (a) sama ada Mahkamah Rayuan yang mendengar rayuan dari Mahkamah Tinggi boleh bergantung kepada s. 69(4) AMK untuk menggantikan pembelaan keistimewaan terhad yang diplid dengan keistimewaan mutlak yang tidak diplid atau dibangkitkan di Mahkamah Tinggi ('soalan (iii)'); dan (b) sama ada mahkamah peringkat rayuan, setelah menghadkan pihak-pihak dalam rayuan hanya kepada satu isu pembelaan di sisi undang-undang bagi maksud rayuan tersebut, boleh membenarkan satu lagi isu pembelaan kepada perayu yang mana isu tambahan tersebut tidak pernah diplid atau dibangkitkan oleh perayu di mahkamah awal ('soalan (iv)'). Selain daripada soalan-soalan ini, plaintif juga menghujahkan bahawa Mahkamah Rayuan, apabila menggantikan pembelaan yang diplid, gagal memberikannya hak untuk didengar, kegagalan mana menyebabkan keputusan mahkamah tersebut menjadi cacat secara yang memudaratkan dan tidak boleh dipertahankan di sisi undang-undang.

Diputuskan (membenarkan rayuan dan mengekalkan perintah Mahkamah Tinggi)
Oleh Arifin Zakaria KHN menyampaikan penghakiman mahkamah:

(1) Mengambil kira keempat-empat soalan yang dikemukakan, adalah teratur bagi mahkamah ini menangani dahulu soalan (iii) dan soalan (iv). Sekiranya jawapan mahkamah kepada soalan-soalan ini negatif, maka tiada lagi keperluan untuk menjawab soalan-soalan (i) dan (ii).

(2) Sementara ianya betul bahawa Mahkamah Rayuan boleh menimbang satu perkara yang tidak tertera di memorandum rayuan atau tidak dihujah di mahkamah di bawah berdasarkan maksud luas s. 69 AMK dan k. 18(2) Kaedah-kaedah Mahkamah Rayuan 1994, ia adalah tertakluk kepada keperluan yang lebih besar untuk menegakkan keadilan. Di mana keadilan kes menuntut penyimpangan dari kaedah bahawa pihak-pihak adalah terikat dengan alasan-alasan memorandum rayuan, mahkamah boleh membenarkan satu poin baharu untuk dihujah. Walaupun begitu, dalam berbuat demikian, bukanlah menjadi tugas mahkamah untuk mereka atau mencipta satu kausa tindakan, atau satu pembelaan untuk kononnya menegakkan keadilan di antara pihak-pihak, memandangkan pihak-pihak yang bertikai adalah juga terikat dengan apa yang mereka plidkan.

(3) Berdasarkan autoriti dan pembacaan biasa s. 69(4) AMK, kuasa Mahkamah Rayuan hanyalah untuk membuat inferens fakta dan membuat perintah yang sepatutnya dibuat oleh Mahkamah Tinggi. Kuasa tersebut adalah terhad kepada membuat inferens fakta dari fakta-fakta yang telah pun dibuat oleh Mahkamah Tinggi. Ia tidak memberi kuasa kepada Mahkamah Rayuan dalam keadaan apa sekalipun untuk mengganti pliding sesuatu pihak. Berbuat demikian adalah bertentangan dengan prinsip penting bahawa pihak-pihak adalah terikat dengan pliding mereka masing-masing.

(4) Mahkamah Rayuan telah khilaf dan/atau tersalah arah akan dirinya apabila memakai pembelaan keistimewaan mutlak yang tidak pernah dibangkit atau diplid di Mahkamah Tinggi. Jawapan kepada soalan (iii) dengan itu haruslah berbentuk negatif.

(5) Apabila mahkamah berhasrat untuk menimbang satu isu baharu yang difikirnya berkaitan dengan kes di hadapannya, maka mahkamah harus memberikan hak untuk berhujah atas isu yang dicadangkan itu kepada pihak-pihak sebelum membuat keputusan mengenainya. Ini adalah tunggak kepada sistem adversarial yang diamalkan di negara ini. Berdasarkan transkrip, yang tidak dicabar oleh defendan, Mahkamah Rayuan jelas gagal memberikan plaintif hak untuk menjawab terhadap

pembelaan keistimewaan mutlak. Mahkamah Rayuan dengan itu telah bertindak secara yang bertentangan dengan kaedah keadilan semulajadi yang sekaligus menyebabkan berlakunya salah laksana keadilan. Soalan (iv) dengan itu harus juga dijawab secara negatif.

Case(s) referred to:

Amanah Butler (M) Sdn Bhd v. Yike Chee Wah [1997] 2 CLJ 79 CA ***(refd)***

Cheow Chew Khoon @ Teoh Chew Khoon (Yang Berniaga Sebagai Cathay Hotel) v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 CA ***(refd)***

Hoecheng Products Co Ltd v. Cargill Hong Kong Ltd [1995] 1 WLR 404 ***(foll)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor [1995] 3 CLJ 520 CA ***(refd)***

Mohd Azam Shuja & 4 Ors v. United Malayan Banking Corporation Bhd [1995] 1 CLJ 861 HC ***(refd)***

Len Min Kong v. United Malayan Banking Corp Bhd & Anor Appeal [1998] 2 CLJ 879 CA ***(refd)***

Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor [2009] 6 CLJ 430 FC ***(foll)***

Ramanathan Chelliah v. PP [2009] 6 CLJ 55 CA ***(refd)***

RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd [2010] 1 CLJ 665 FC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 69(4)

Rules of the Court of Appeal 1994, r. 18(2)

For the appellant - Yusuf Khan Ghows Khan; M/s Yusuf Khan & Fong

For the respondent - Dhanaraj Vasudevan & Kalai Selvi M; M/s Kamil Hashim Raj & Lim

[Editor's note: Appeal from Court of Appeal; Civil Appeal No: N-02-1630-11 (overruled); Appeal from High Court, Seremban; Civil Appeal No: 22-70-2011 (affirmed)]

Reported by Wan Sharif Ahmad

JUDGMENT

Arifin Zakaria CJ:

Introduction

[1] This is an appeal by the appellant against the decision of the Court of Appeal dated 20 September 2012 which allowed the respondent's appeal. Leave to appeal was granted by this court on 18 June 2013 and 29 July 2015 on the following four questions of law:

(i) whether a person on an occasion of privilege as between himself and some other person, makes some defamatory statement affecting a third person who has nothing to do with the privilege occasion, that third person would have a right of action against that person making the defamatory statement;

(ii) whether the defence of qualified privilege which apply to a defamatory statement made on an occasion of privilege applies to a republication thereof to a third party;

(iii) having regard to the established principle that parties are bound by their pleadings, may the Court of Appeal hearing an appeal against the decision of the High Court, invoke s. 69(4) of the Courts of Judicature Act 1964 to substitute the defence as pleaded in the case before the High Court with another defence which was neither pleaded nor raised before the High Court; and

(iv) whether an appellate court, after having confined the parties on an appeal before it, to only one issue of defence in law for purpose of the appeal, may then avail the appellant another issue of defence which the said appellant had never pleaded nor raised in the court of first instance, to allow the appellant's appeal, based on the issue of defence in law which the Court of Appeal availed to the appellant under s. 69(4) of the Courts of Judicature Act 1964.

[2] In this grounds of judgment, the appellant is referred to as the plaintiff and the respondent as the defendant, as in the High Court.

Background Facts

[3] On 14 December 1998, a police report was lodged by the defendant. The contents of the police report included an allegation of a conspiracy to cheat the defendant purportedly perpetrated by the law firms of Messrs A Zahari Kanapathy Thulasi, together with the plaintiff.

[4] Following this, the defendant sent a letter of complaint dated 25 August 1999 to the Advocates and Solicitors Disciplinary Board ("DB") against members of the law firm. This letter contained references to the plaintiff in a derogatory manner. The plaintiff was the client of the solicitors, at the material time, against whom the complaint was lodged.

[5] The plaintiff took offence at the contents of the letter of complaint and the police report. A letter of demand was sent to the defendant, through his then solicitors, dated 29 March 2011. The letter of demand, *inter alia*, required the defendant to withdraw the letter of complaint, tender an apology and pay damages to the plaintiff.

[6] Upon the defendant failing to respond to the letter of demand, the plaintiff then commenced this action.

Decision Of The High Court

[7] The learned High Court Judge allowed the plaintiff's claim and ordered the defendant to pay general, aggravated and exemplary damages, totalling RM230,000. In delivering his judgment, Abdul Alim Abdullah J stated:

A 8. ... Mahkamah membuat pendapat Defendan dengan hasad yang berlatarbelakangkan faktor-faktor di atas itu telah didorong dengan niat jahat dalam membuat aduan kepada Lembaga dan laporan Polis berkenaan.

9. Mahkamah membuat pendapat dengan itu, tidaklah terwujud apa-apa "qualified privilege" sebagai pembelaan di pihak Defendan. Jauh sekali
B Defendan tak berkeupayaan untuk berani membela dirinya atas pembelaan "justification". Defendan lesu dalam keterangannya berbanding dengan tuntutan-tuntutan Plaintif. Cukuplah diperkatakan di sini bahawa Defendan tak peduli dan tak menghiraukan kebenaran kedudukan Plaintif dan aduan kepada Lembaga dan Laporan Polis oleh Defendan jelas sekali bermanifestasikan niat jahat bulat-bulat terhadap Plaintif memandangkan
C kedudukan sosial dan status bisnes Plaintif di kalangan komunitinya dan secara amnya.

10. Mahkamah membuat keputusan membenarkan tuntutan Plaintif terhadap Defendan sepertimana menurut Pernyataan Tuntutan dalam guaman ini.

D **Decision Of The Court Of Appeal**

[8] Aggrieved, the defendant then appealed to the Court of Appeal. The Court of Appeal allowed the defendant's appeal with no order as to costs. In delivering judgment of the court, Anantham Kasinather JCA held as follows:

E Absolute Privilege

a) Police Report

6. We allowed this appeal on the conclusion of hearing submissions because, in our judgment, the law has developed to an extent whereby the contents of a police report and a letter of complaint to the disciplinary
F board enjoy absolute immunity as opposed to qualified privilege only. ...

[9] The reasons for allowing the appeal may be gathered from the following passage in the judgment of the Court of Appeal:

19. We allowed this appeal and ordered the order of the High Court to
G be set aside on the conclusion of the appeal as, in our judgment, the contents of the letter of complaint and the police report are both not actionable in law for the reasons stated in this judgment. We are conscious that absolute privilege / immunity was not expressly pleaded in the statement of defence. However, in our opinion, paragraph 8 properly understood amounts to a plea that the claim is not maintainable against
H the appellant. In any event, in our judgment, Section 69 (4) of the Courts of Judicature Act 1964 confers on this Court the power in an appropriate case to allow an appeal on a ground which was not canvassed before the High Court. Since it is now settled law in other jurisdictions that no action for defamation is maintainable in respect of the contents of a letter of complaint to the DB and a police report save in the limited cases, which
I are not relevant here, we are constrained to invoke Section 69 (4) to base

our judgment in this case. Since the issue of absolute privilege was raised by the Court, we did not order any costs against the respondent. We ordered the deposit to be refunded to the appellant.

[10] In short, the Court of Appeal held that the contents of the police report and the complaint to the DB were both protected by the defence of absolute privilege and hence not actionable in law. Even though absolute privilege was not pleaded by the defendant, the Court of Appeal held that para. 8 of the defendant's defence was sufficiently broad to sustain the defence of absolute privilege. In the alternative, the Court of Appeal relied on s. 69(4) of the Courts of Judicature Act 1964 (CJA) was purportedly giving them the power in appropriate cases to allow an appeal on any ground even though it was not canvassed before the High Court.

Decision Of This Court

[11] Considering the four questions posed to us, we are of the opinion that it is more appropriate for us to first deal with questions (iii) and (iv). We are of the view that, should our answer to these two questions be in the negative, then it would not be necessary for us to answer questions (i) and (ii) as our answer to these two questions would, in the circumstances, be rendered academic.

Powers Of The Court Of Appeal Under S. 69 Of The CJA

[12] The Court of Appeal relies heavily on s. 69(4) of the CJA as giving the Court of Appeal broad powers in dealing with an appeal before it. It will be appropriate therefore to first consider what the said section seeks to provide. It reads:

S. 69 Hearing of appeals

(1) Appeals to the Court of Appeal shall be by way of re-hearing, and in relation to such appeals the Court of Appeal shall have all powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.

(2) The further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.

(3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.

(4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

A (5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties, although the respondents or parties have not appealed from or complained of the decision.

B (emphasis added)

[13] From the above provision, it is clear that an appeal to the Court of Appeal is by way of re-hearing and the Court of Appeal in exercising its power under s. 69 of the CJA shall have all powers and duties, as to amendment or otherwise, of the High Court. In hearing an appeal, it is not C improper for the Court of Appeal to draw whatever inferences of facts and make judgments on them. The Court of Appeal may, upon reviewing the facts, arrive at a different conclusion on the primary facts as found by the trial court especially where there has been a non-appreciation or a misappreciation of those facts by the trial court.

D **[14]** While it is true that the Court of Appeal can consider a point not expressly taken in the memorandum of appeal or argued in the court below based on the broad wording of s. 69(4) of the CJA and r. 18(2) of the Rules of the Court of Appeal 1994, this is subject to the overriding discretion of the court to do justice. Where the justice of the case requires a departure from E the rule that parties should be bound by the grounds in the memorandum of appeal, the court may allow a new point to be argued. (See *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor* [1995] 3 CLJ 520; *Cheow Chew Khoon @ Teoh Chew Khoon (Yang Berniaga Sebagai Cathay Hotel) v. Abdul Johari Abdul Rahman* [1995] 4 CLJ 127; *Mohd Azam Shuja & 4 Ors v. United Malayan Banking Corporation Bhd* [1995] 1 CLJ 861) In so F doing, it is however not the duty of the Court of Appeal, to invent or create a cause of action or a defence under the guise of doing justice for the parties as it is also trite that parties in litigation are bound by the four corners of their pleadings. (See *RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd* [2010] 1 CLJ 665; [2010] 2 MLJ 188).

G **[15]** What happened in the present case was that the Court of Appeal in the purported exercise of its discretion under s. 69(4) of the CJA had substituted the defence of qualified privilege with that of absolute privilege, a defence which was never pleaded nor raised before the High Court. From the H authorities set out earlier and the plain reading of s. 69(4) of the CJA, the power of the Court of Appeal is only to draw inferences of facts and to make an order which ought to have been made by the High Court. The power is essentially limited to making of inferences of facts from the facts as found by the High Court. This is clearly demonstrated in the case of *Len Min Kong v. United Malayan Banking Corp Bhd & Anor Appeal* [1998] 2 CLJ 879; [1998] I 2 MLJ 478. It is clear from the reading of the said section that it does not

confer on the Court of Appeal the power to substitute pleadings of party in any circumstance. To do so would be contrary to the cardinal principle in civil litigation, that parties are bound by their pleadings. As stated by James Foong FCJ in *RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd* (*supra)*:

> ... the proposition of the Court of Appeal was not even pleaded by the respondent ... parties must abide by their pleadings ... It is not the duty of the Court to invent or create a cause of action or a defence under the guise of doing justice for the parties ...

(See also *Amanah Butler (M) Sdn Bhd v. Yike Chee Wah* [1997] 2 CLJ 79; [1997] 1 MLJ 750 CA).

[16] Accordingly, we agree with learned counsel for the plaintiff that in the circumstances of the present case, the Court of Appeal had erred and/or misdirected itself in invoking the defence of absolute privilege which was never pleaded nor raised in the trial before the High Court. In the result, our answer to question (iii) is in the negative.

[17] We now turn to question (iv). The issue raised by the plaintiff is that the Court of Appeal in arriving at its decision failed to give the plaintiff the right of hearing. This the plaintiff alleged is supported by the transcript of the proceedings before the Court of Appeal which was made available to us in the core bundle. From the transcript it is indisputable that even though the defence of absolute privilege was raised in the Court of Appeal however it was not fully argued, and as righty contended by learned counsel, the plaintiff was never given the opportunity to submit on the issue. Hence, the plaintiff contended that, in the circumstances, the Court of Appeal had acted contrary to the rules of natural justice and on this ground alone, the decision of the Court of Appeal ought to be set aside.

[18] This is indeed a serious allegation levelled against the Court of Appeal. Having examined the transcript, we notice that what had transpired at the Court of Appeal was that the defence of absolute privilege was only mentioned in passing by learned counsel for the defendant in his closing submission. The court then took a short adjournment, which was followed by their decision. The plaintiff's complaint was that he was never given the opportunity to submit on the issue which was raised for the first time in the Court of Appeal.

[19] Based on the transcript, which is not challenged by the defendant, it is clear that the Court of Appeal failed to give the plaintiff the right to reply on the defence of absolute privilege. In the circumstances, we agree with the learned counsel for plaintiff that the Court of Appeal had acted contrary to the rules of natural justice. In an adversarial system, parties must be given the right of hearing, by that we mean the right to present his case before the court. This is to assist the court in coming to its decision. The danger of the court making decision on its own without hearing parties was highlighted by

the Federal Court in *Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor* [2009] 6 CLJ 430; [2009] 6 MLJ 293, where Zaki Azmi CJ observed at p. 302:

> It is therefore dangerous and totally inadvisable, for the court, on its own accord, to consider any point without reliance on any pleadings or submission by counsel appearing before them. If the learned judge thinks there are any points which are relevant to the case before him and which was not raised by either party, it is his duty to highlight that to the parties before him. He must then give an opportunity for both parties to further submit on that particular point (see *Hoecheng Products Co Ltd v. Cargill Hong Kong Ltd* [1995] 1 WLR 404 at pp. 407409).

[20] In that case, the court had occasion to refer to the case of *Hoecheng Products Co Ltd v. Cargill Hong Kong Ltd* [1995] 1 WLR 404, where a similar issue came to be considered by the Privy Council in an appeal from the Court of Appeal of Hong Kong. Lord Mustill in delivering judgment of the Privy Council made the following observations:

> The principles which inhibit the parties from raising new points on appeal, particularly where the fact have not been investigated at the trial, are so well established that it is unnecessary to quote from authorities such as *Tasmania (Owners of) v. City of Corinth (Owners of)* (1890) 15 App Cas 223, *Connecticut Fire Insurance Co v. Kavanagh* [1892] AC 473 and *Esso Petroleum Co Ltd v. Southport Corporation* [1956] AC 218.
>
> These principles apply equally where it is the court, rather than the parties, which seeks to introduce the new legal issue. If in the present case the matter had been ventilated in open court, it would, their Lordships believe, soon have become apparent that there had been insufficient exploration of the facts at the trial to permit the application of whatever law might have emerged from an examination of the authorities. In the event, however, even this modest examination did not take place. The point appears to have been an afterthought. It does, of course, happen from time to time that a court comes to learn of a statue or authority bearing importantly on an issue canvassed in argument but, through an oversight, not then brought forward. The court may wish to take the new matter into account. Before doing so it should always ensure that the parties have an opportunity to deal with it, either by restoring the appeal for further oral argument, or at least by drawing attention to the materials which have come to light and inviting written submissions upon them. The present case required even more meticulous procedures, for what the court introduced was not new material on the existing issue but an entirely new question of law and fact. The occasions when an appellate court would find it proper even to contemplate such a course after the conclusion of the arguments must be rare, but if it were ever to do so the first step must always be to have the matter thoroughly explored by adversarial means, as regards not simply the merits of the new question but also the propriety of entering upon it at all ...

(See also *Ramanathan Chelliah v. PP* [2009] 6 CLJ 55).

[21] It is thus clear that whenever the court proposes to consider a fresh issue which the court considers pertinent to the case before it, it should give the parties the right to make submissions on the proposed issue before arriving at its finding. This is fundamental in the adversarial system that we practise in this country.

[22] We would venture to say that, in the present case, the court would have come to a different finding had it given the parties the opportunity to submit on the defence of absolute privilege, which was never pleaded nor raised before the trial court. In invoking the defence of absolute privilege the Court of Appeal failed to give the plaintiff the right of rebuttal. This is a flagrant breach of the rules of natural justice thus occasioning a failure of justice.

[23] For the above reasons, our answer to question (iv) is also in the negative. In view of our answers to questions (iii) and (iv) above, it is, therefore, not necessary for us to answer questions (i) and (ii) as it would have no bearing whatsoever on the outcome of this appeal.

Conclusion

[24] In the upshot we allow the appeal with costs. The order of the High Court is accordingly reinstated.